81-2139

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

DONALD E. TYLER,
Petitioner

v.

THE HARTFORD INSURANCE GROUP, FRANCES FRY, and ROBERT S. BRITTAIN.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS AND THE SUPREME COURT OF COLORADO

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QUESTIONS PRESENTED

1. Has the petitioner been denied without due process of law his right to trial for damages in a civil case for each and all of his claims for relief including for (a) libel, (b) slander, (c) unlawful interference with his lawful practice of medicine and pursuant to conspiracy, (d) deprivation of valuable rights protected by the Fourteenth Amendment of the U.S. Constitution without due process of law, and (e) emotional distress intentionally caused by the outrageous conduct of defendants?

2. Was the doctrine of collateral estoppel inappropriately and erroneously applied in this case which deprived the petitioner of his right to trial?

3. Did the Colorado Courts error in denying the petitioner the right to any and all discovery he sought?

4. Does Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 582, 41 L.Ed.2d 789 (1974), make inactionable for libel and/or wrongful intentional interference with practice of a profession republications, by persons other than the author, of a libelous per se document concerning one's profession, concerning a private matter, stated in form of fact, and with no public media involved, if it is an opinion of the author?

5. In review of dismissal by summary judgment, did the Colorado Courts error in rejecting as part of the record on appeal depositions of defendants and co-conspirators taken in a related case and incorporated in this case by affidavit?

6. Did the Colorado Courts error in not considering the total allegations in each of the claims for relief?

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IN THE

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DONALD E. TYLER,

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THE HARTFORD INSURANCE GROUP,

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Respondents

PETITION FOR WRIT OF CERTIORARI TO

THE COLORADO COURT OF APPEALS AND

THE SUPREME COURT OF COLORADO

To the Honorable Chief Justice and

Associate Justices of the Supreme Court of

the United States:

Donald E. Tyler, the petitioner herein,

prays that a writ of certiorari issue to review

the judgment of the Colorado Court of Appeals

entered in the above entitled case on

December 31, 1981, and denial of petition for writ of certiorari by the Colorado Supreme Court on March 29, 1982.

OPINIONS BELOW

The judgment of the Colorado Court of Appeals, not selected for publication, is printed in Appendix A, hereto, infra, pages A-1 through A-15. Its order denying petition for rehearing is printed in Appendix A hereto, infra, page A-16. The order of the Colorado Supreme Court denying petition for writ of certiorari is printed in Appendix A hereto, infra, page A-17.

JURISDICTION

The judgment of the Colorado Court of Appeals (Appendix A, pages A-1 through A-15) was entered December 31, 1981. A timely filed petition for rehearing was denied on January 28, 1982. (Appendix A, page A-16)

A timely filed petition for writ of certiorari was denied by the Colorado Supreme Court on March 29, 1982. (Appendix A, page A-17) This petition is timely filed in accord with 28 U.S.C. § 2101(c). The jurisdiction of the U.S. Supreme Court is invoked under the 1st, 7th, and 14th Amendments of the U.S. Constitution. The plaintiff has been denied his right to trial for damages without due process of law which includes claim under 42 U.S.C. § 1983 and claims under common law.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED

The First Amendment to the U.S. Constitution provides in pertinent part:

> Congress shall make no law respecting... the right of the people...to petition the Government for a redress of grievances.

The Seventh Amendment to the U.S.

Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

Article II of the Constitution of the State of Colorado provides in pertinent part:

> Sec. 6. Equality of Justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be adminstered without delay.
>
> Sec. 10. Freedom of speech and press. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury,

under the direction of the court, shall determine the law and the fact. (emphasis added)

Colorado Revised Statutes, 1973, provide in pertinent parts:

18-4-412. Theft of medical records or medical information - penalty. (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

...

(3) Theft of a medical record or medical information is a class 5 felony.

12-43.5-102. Establishment of review committee - function. (1) A review committee may be established pursuant to this section to review and evaluate the quality of care being given patients by any physician licensed under article 36 of this title, in order to protect patients against the unauthorized, unqualified, and improper practice of such physician. (2) .... Such a committee may be authorized to act only by: ... (d) A

society or an association of physicians whose membership includes not less than one-third of the medical doctors or doctors of osteopathy licensed to practice and residing in this state if the physician whose services are the subject of review is a member of such society or association.

(3) (a) ... An investigation may relate .. or any other matter affecting the quality of care provided.

(b) (I) If the findings of the investigation indicate substantial lack in the quality of care rendered by such physician, the review committee shall hold a hearing to consider the findings; ...

(II) The physician allegedly offering substandard care shall be notified of such a hearing, shall have a right to be present and be represented by counsel at such hearing, and shall be allowed to offer evidence in his own behalf.

(c) After such hearing, the review committee shall make any recommendations it deems necessary for the discipline of such physician to the governing board of the hospital or as provided by written bylaws of the hospital or by federal law or regulation. A copy of such recommendations shall be given to the physician allegedly offering substandard care, and he shall have the right to appeal the decision of the review committee to the governing board or other body to which the recommendations are made. ... (emphasis added)

10-4-109. Nonrenewal of medical malpractice policies. (1) No insurer shall refuse to renew a policy of medical

malpractice insurance unless such insurer or its agent mails or delivers to the named insured, at the address shown in the policy, at least sixty days' advance notice of its intention not to renew. ...
(4) In the event an insurer refuses to renew, the insured may, by written request, demand a written notification of the reasons for nonrenewal. Such notification shall be given the insured within twenty days after receipt of such request. ...

13-90-107. Who may not testify without consent - records. ...(d) A physician or surgeon duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient, but this paragraph (d) shall not apply to:
... (III) A review of a physician's services by any of the following:
... (D) A peer review committee of a society or association of physicians ... and only if ... said physician has signed a release authorizing such review; ...

Colorado Rules of Civil Procedure provide in pertinent part:

Rule 26. General provisions governing discovery. ... (b) Scope of Discovery. ... (1) In General. Parties may obtain discovery regarding any matter, not

privileged, which is relevant to the subject matter involved in the pending action, ...

(3) Trial Preparation: Materials. Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party of or by or for that other party's representative(including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. ... (emphasis added)

Rule 36. Requests for Admission. ... The matter is admitted unless, within thirty days after service of the request, ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, ... (emphasis added)

STATEMENT OF CASE

This action was commenced on April 28, 1977. The complaint is printed in Appendix A hereto, infra, pages A-18 through A-73 and

amendments thereto were filed December 29, 1977, Appendix A, pages A-74 through A-85.

The undisputed facts of the case as established by depositions in related lawsuits incorporated in this case by affidavit of the plaintiff, affidavit of the plaintiff that all allegations of the complaint are true, other affidavits of the plaintiff, unanswered requests for admission directed in this lawsuit to the defendants including admission that all allegations of the complaint and amended complaint are true and correct pursuant to Rule 36, C.R.C.P., supra, and testimony and jury findings in related lawsuits include the following facts.

The petitioner is a Mayo Clinic-trained urologist certified by the American Board of Urology. His established medical practice was maliciously destroyed and he has been unable to work at his chosen profession since

1977 as a proximate result of the illegal acts committed intentionally for the unlawful purpose of malicious interference with his medical practice and other malicious reasons by defendants in this case and their co-conspirators.

The petitioner was a member of the medical staff of a small community hospital, and a part of the responsibilities included rotation to provide emergency care in the emergency room. Medical staff officers were elected annually on an informal rotation basis. Doctors Marks and Larsen came to the community in 1971 directly from residencies in radiology and surgery, respectively. In 1974 they were elected president and vice-president of the staff, which made them two of the three members of the executive committee. Utilizing that committee they

proceeded to systematically eliminate competition of a "clinic" group they organized. They attempted to entrap the petitioner and the entrapment failed. In spite of failure of the attempted entrapment, they scheduled a disciplinary hearing of the petitioner related to emergency room practice which they admitted to be without charges and without the required written request for corrective action. Notice for hearing was defective in lacking specific charges and was untimely. (Appendix A, pages A-97 and A-98.) The petitioner did not appear and was consequently wrongfully denied reappointment to the hospital medical staff, and was "blacklisted" from other hospital medical staffs. Suit was commenced against Marks, Larsen, and others in June, 1975. Trial to a jury ending March 6, 1980, resulted in the jury

finding for the petitioner apportioned damages in the amount of $730,000,00. Interrogatories answered by the jury found a conspiracy as alleged. There was no legitimate defense. That case is subject of pending petition for writ of certiorari by this Court, No. 81-2007.

Separated from that suit was a suit against Donald Gaylor and Dale Alter, Gaylor for publishing a libelous letter to Alter and against Alter for soliciting its writing and for republishing it. Donald Gaylor was not present and the information for his letter came from Gaylor's wife, an employee of competing urologists who then started practicing in that Brighton hospital. That lawsuit ended July 1, 1977, with a verdict for the defendants. The letter to Alter, subject of that suit, was ruled by the trial Court as a matter of law to be libelous per se, related

to the plaintiff's profession, and concerned a private matter. Contrary to the Appeals Court on page A-7, the issue of defamation was not presented to the jury. No competent evidence was presented directed to proving the truth of accusations of unprofessional conduct. Contrary to the false damaging statement of the Appeals Court on page A-3, the petitioner did not refuse treatment and there is no evidence in that case or in this case of such. Unanswered requests for admission to the defendants in the instant case established the undisputed facts of proper referral, a form of providing care. Referral of the 79 year old patient to her usual physician, a general surgeon not on the staff of the hospital, was completed while the patient was still in the emergency room. He assumed responsibility for her care, and there has been no claim of damage or harm

due to action or inaction of the petitioner. In appeal of that case for reversal, the Colorado Court of Appeals determined as a matter of law that the letter was not libelous because of expression of opinion, citing dicta in Gertz v. Welch, 418 U.S. 323, 94 S.Ct 582, 41 L.Ed.2d 789. That decision is printed in Appendix A, pages A-86 through A-96. Prior to determination of the appeal, the Colorado Court of Appeals reported that all trial exhibits were destroyed along with 50 depositions taken by the petitioner in that case and in the related Marks-Larsen case.

Marks and Larsen and the petitioner were each insured by Hartford. Marks and Larsen were each insured for one million dollars subject to claims by the petitioner in the aforementioned lawsuit against them. The Colorado Medical Society had and has a

vested interest because of a contract with Hartford which provides for refund of premiums to its insured members that are unused to pay Colorado claims, a substantial sum to each physician. To gain unlawful help in defending Marks and Larsen, including damaging the petitioner as alleged, and with full knowledge of the conspiracy in progress to damage the petitioner's medical practice, Hartford's claim adjuster, defendant Fry, published to defendant Robert Brittain, M.D., all files of Hartford related to the petitioner including but not limited to Exhibit A of the complaint (Appendix A, pages A-39 through A-41), correspondence among attorneys, Marks, Larsen, Fry, and other Hartford personnel, hospital medical records of patients of the petitioner unlawfully in its possession (see C.R.S. 18-4-412, supra),

and complaints in various pending lawsuits including exhibits thereto printed in Appendix A, infra, pages A-97 through A-101.

Brittain, a member of the Risk Management Committee of the Colorado Medical Society, republished the contents of the aforementioned false defamatory documents and medical records at meetings of the committee which non-member, non-physicians attended. Members of the committee have admitted that a primary purpose of the committee was to aid Hartford in defending lawsuits against insured physicians. The pending cases instituted by the petitioner as plaintiff did not involve any accusations of substandard care which was admittedly recognized by the defendants. They had no accusations of such for their jurisdiction. The only lawful jurisdiction of the committee was concerning

quality of medical care. C.R.S. 12-43.5-102, supra. Brittain and other committee members proceeded to write the petitioner a series of deceitful, abusive, threatening, harassing, intimidating letters which in effect demanded that the petitioner grant them permission to examine all hospital medical records of persons cared for by him. The letters are printed in Appendix A, infra, pages A-42 —A-44, A-79— A-85, A-102— A-114. Contrary to the false statement of the Colorado Appeals Court on pages A-3 and A-4, as can be readily seen in the letters, the petitioner was not requested to produce records. Apparently the Court preferred to avoid the issue of the felony of theft and attempted theft of medical records by defendants. C.R.S. 18-4-412, supra. The defendants were clearly coercing the

the petitioner to grant them permission to examine medical records without a medical care reason,which would constitute a felony. The petitioner had not been supplied a reason to justify his consenting to such breach of patients' confidences, contracts, and C.R.S. 13-90-107 which provides for a required release or permission without a provision mandatorily requiring the physician to grant such. C.R.S. 13-90-107, supra. The purported deceitful reason the defendants and co-conspirators gave for their demand in their letter and in contemporaneous depositions taken in related cases, on its face not in the jurisdiction of the committee, was to determine whether records of patients seen three years before, in 1974, in Brighton Community Hospital and particularly in the emergency room and other patients were

adequate for legal purposes in the hypothetical event the petitioner were sued. See pages A-79— A-81 and A-82. They never indicated a concern with quality of care of any patient or group of patients.

The committee members admitted in depositions in related cases that they had no reason to believe the petitioner would be sued and that they knew that the statute of limitations for such actions was two years. When the letters were written in 1977, the committee knew that the petitioner was not practicing in any emergency room. (see A-79) The inference is clear that the committee's interest was not related to present insurance matters but was connected to the lawsuit against Marks and Larsen. The hearing scheduled by Marks and Larsen about emergency room practice in 1974 was

without charges, and the insurer, Hartford, desperately needed a fishing expedition. The letters threatened and recommended non-renewal of the petitioner's professional liability insurance, an act clearly beyond authority by C.R.S. 12-43.5-102, and from which that statute provided no appeal in contrast with availability of appeal for acts performed within the jurisdiction of that statute. Hartford then imposed the unconcionable condition precedent to any renewal of the petitioner's insurance permission to Hartford for it to examine all medical records of patients cared for by the petitioner in breach of professional ethics, in breach of contracts with patients, in invasions of privacy, and in violation of C.R.S. 1973, 18-4-412. The plaintiff did not yield to such unlawful oppression. The

committee of which Brittain was an acting member then acted without notice of hearing, without charges, and without hearing and determined that the petitioner did not "cooperate." It is submitted that the term is common when one does not yield to unlawful oppression. For the "reason" he did not "cooperate," the committee recommended to Warren & Sommer, Inc., to not renew the petitioner's professional liability insurance. That was clearly in excess of jurisdiction provided by C.R.S. 12-43.5-102. The petitioner answered a letter (A-82) with the letter of A-115 requesting cooperation of the chairman to supply information, but the letter was unanswered by anyone.

The Colorado Courts dismissed the first claim for libel and the second claim for slander by applying the doctrine of collateral estoppel as to Exhibit A of the complaint and

determined other libelous documents identified in depositions in related cases (pages A-97 through A-101) were inactionable because the petitioner had included them as exhibits in a complaint. The Appeals Court acknowledged that they were identified as being referred to in requests for admission "in the prior cases." Of course they were involved in the other cases. But they were also identified in requests for admission in this instant lawsuit as included in the libel and slander alleged in paragraphs 4 and 13 of the complaint along with documents which revealed that there was no legitimate defense in the Marks-Larsen case. Defamation unidentified because of denied discovery was not addressed. The fifth claim for outrageous conduct intentionally causing emotional distress was dismissed

by summary judgment. The third claim for wrongful intentional interference with business and the 4th claim under 42 U.S.C. § 1983 were dismissed as not stating claims for which relief can be granted. The orders for dismissal are printed in Appendix A, infra, pages A-119 through A-147.

Right to trial for damages is a property protected by the Fourteenth Amendment. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U.S. 1, 19, 38 L.Ed. 55, 64,65 (1893). Trial by jury in civil suits as herein is a matter of right in Colorado. Miller v.Carnation Co., 33 Colo. App.62, 516 P.2d 661 (1973). In actions for libel and slander, both law and fact are to be determined by the jury. Colorado Constitution, Art. II, sec. 10, supra. The petitioner has been wrongfully denied his right to trial for

damages in violation of the 14th Amendment. Review by way of appeal is a matter of right. Monti v. Bishop, 3 Colo. 605 (1877); Hull v. Denver Tramway Corp., 97 Colo. 523, 50 P. 2d 791 (1935); Bankers Trust Co. v. Hall, 116 Colo. 566, 183 P. 2d 986 (1947). Departure from acceptable standards as here by the Colorado Court of Appeals is a denial of the right of appeal and of due process. Cochran v. Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453. The Appeals Court garbled facts in almost all significant statements. Its application of law as to the true facts of the case were consequently in gross error.

Estoppel inappropriately applied herein was one of the means employed which deprived the petitioner of his right to trial to recover damages. The petitioner was denied the benefit of stare decisis and the decision subject of this petition is not in accord

with decisions of this Court. First, and not addressed by the Appeals Court, the decision upon which estoppel is based clearly is labeled and designated "NOT SELECTED FOR PUBLICATION NOT TO BE CITED AS PREGEDENT IN ANY COLORADO COURT." The opinion clearly stated that it was to be applied to that case alone at the time this instant case was pending. The plaintiff relied upon that statement. (Page A-86)

Further, estoppel is not favored and all elements must clearly appear. Langley v. Young, 72 Colo. 466, 211 P. 640. Collateral estoppel requires precisely identical facts, issues and proofs in each case. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973); Ropacki v. Ropacki, 188 N.E. 400 (Ill. 1933); County of Mobile v. Kimball, 102 U.S. 691, 705, 26 L.Ed. 238, 242 (1880). Only issues litigated and adjudicated are subject to

collateral estoppel. Parrish v. DeRemer, 187 P. 2d 597 (Colo. 1947); RESTATEMENT JUDGMENTS § 68.

The facts litigated are different. The only letter adjudicated and to which the opinion of the Gaylor case, pages A-86 through A-96, applies is the letter as written therein (pages A-90 and A-91). That is the fact relied upon for applying estoppel. That letter, that fact, is different than the fact of the letter of Exhibit A of the instant complaint, pages A-39 through A-41. Exhibit A alleges unprofessional conversation; the letter of the Gaylor case does not. A jury would read the two letters as different whether the judges had difficulty or not. The judges' finding of fact as a matter of law can be re-examined. (see page A-92)

The issues and proofs are different. The

letter of the Gaylor opinion was written contemporaneously with the incident to which it refers. Contrary to the finding of the Appeals Court on page A-3, except for the date on the letter, an item unsworn to, there is nothing in the record to indicate that the letter of this case was written contemporaneously with the incident. Unanswered requests for admission establish that the Gaylor -Marks letter of this case was phony and written much later with a fraudulent purpose, and that it was written under the direction of defendants Fry and Hartford. Testimony by a document expert established that it was written much later than July 3, 1974. It was first produced by Marks in 1976, after the statute of limitation for libel as to its publication to him had passed, apparently for the fraudulent purpose for Gaylor and Alter to

claim damage came from the letter to Marks rather than from the letter to Alter which was subject of the libel suit in progress.

The opinion defense was initiated by the Appeals Court in the Gaylor case. It was not litigated or subjected to cross examination. The letter was found to be not actionable as defamation as a matter of law because of expression of opinion. The interpretation of statements of the letter was the Appeals Court's and not evidence in the trial. It is submitted that that defense is personal to Gaylor and not available to defendants herein for its republication. Squarely within the holding of Pomeroy v. Waitkus, supra, collateral estoppel cannot apply when the same defenses are not available in both cases.

The petitioner was unable to fully litigate the Gaylor case, and its appeal was defective

due to the Appeals Court. The trial exhibits were destroyed in that Court prior to determination of the appeal along with 50 depositions the petitioner took in that and the related Marks-Larsen case. That included the letter upon which estoppel herein was based. Collateral estoppel is inappropriate when there has been no opportunity to fully litigate the case relied upon. Pomeroy v. Waitkus, supra; William Whitman Co. v. Universal Oil Products Co., 92 F.Supp. 885 (Del. 1942).

Collateral estoppel is not applicable to questions of law. RESTATEMENT JUDGMENTS § 70. The determination of the character of the Gaylor-Alter letter as being non-defamatory was as a matter of law. (A-92) Estoppel is inapplicable.

Estoppel of record or judgment requires

the complete record in evidence of proceedings of the case upon which it is based. Missouri Utilities Co. v. City of California, 14 F. Supp. 613 (W. D. Mo., 1936); Lumbermen's Mut. Cas. Co. v. Lumbermen's Mut. Cas. Ins. Co. of New York, 19 So. 2d 865 (Fla. 1944); Johnson v. Ota, 43 Cal. App. 2d 94, 110 P. 2d 507 (1941); State v. Manpower of Omaha, 80 N. W. 2d 580 (Neb. 1957). None of the record of the Gaylor case was in evidence in either the trial Court of the Appeals Court.

The application of the doctrine of collateral estoppel to this case was clearly error by all accepted procedural and substantive standards.

Further, it is submitted that Exhibit A of the complaint is as a matter of law obviously libelous per se. In common law defamation is actionable regardless of form, including form of opinion. 53 C. J. S. p. 46. Even

under conditions some courts allow damage to reputation by form of opinion, the letter is actionable as defamation because of undisclosed facts of words defamatorily stated to be unprofessional, the body of undisclosed facts of the "unprofessional situation," basis of alleged discrimination, the charge of unprofessional conversation and conduct were made, the matter is not of public concern, and no public media is involved. RESTATEMENT (SECOND) TORTS § 566; PROSSER: Handbook of the Law of Torts, 4th Ed., pp. 711, 712.

Republications of documents appended to a complaint prior to their presentation in public proceedings which are defamatory are actionable for libel at common law and respecting persons other than this petitioner in Colorado. Meeker v. The

Post Printing and Publishing Co., 44 Colo. 355, 135 P. 457; Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922); Park v. The Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888); Parsons v. Age-Herald Pub. Co. 61 So. 345 (Ala. 1913). The Colorado Courts denied the right of trial as to republications of libelous documents appended as exhibits to a complaint, Appendix A, pages A-97 through 101. Those documents were included in paragraphs 4 and 13 of the complaint.

Damages due to wrongful intentional interference with business are subject to civil suit. Lohse Patent Door Co. v. Fuelle, 114 S.W. 997 (Mo. 1908). This includes interference with one's business insurance. Palatine Ins. Co. v. Griffin, 202 S.W. 1014 (Tex. Civ. App. 1921). It is submitted that a jury would easily find that the petitioner

had an expectancy to continued relationships with Warren & Sommer, that he had an expectancy to have his malpractice insurance renewed, that he had an expectancy to not have his insurability damaged, and that the damage alleged affecting his insurance damaged his practice of medicine. Other damage is also alleged.

At common law civil conspiracy involves a lawful purpose accomplished by unlawful means or an unlawful purpose to be effected. McGlasson v. Barger, 431 P.2d 778 (Colo. 1967); Pettibone v. U.S., 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419; Alaska SS.Co. v. Internat'l Longshoremen's Assoc., 236 F. 964 (D.C. Wash., 1916); Duplex Printing Press Co. v. Deering, 41 S.Ct. 172, 254 U.S. 443, 65 L.Ed. 349.

Even if one accepts the untenable

conclusion that the petitioner was not defamed, the petitioner clearly alleged all elements necessary to maintain an action for interference with business by individual defendants and by conspiracy. Unlawful purpose of interference with business has been alleged. Palatine Ins. Co. v. Griffin, supra. Persons joining a conspiracy in progress as herein become responsible for the acts committed prior to such entry of which they had knowledge as herein. Dextone v. Building Trades Council, 60 F.2d 47 (2nd Circ, 1932). Contrary to the false statement of sequences by the Appeals Court on page A-3, Tyler was not removed from emergency room duty after the acts by the defendants herein. Tyler was removed from emergency room call duty in 1974 as part of the conspiracy found by a jury in 1980 in the case against

Marks and Larsen. Defendants joined that conspiracy in 1976, two years after the removal from ER duty. Many overt unlawful acts by defendants have been alleged other than republications of the Gaylor letter, although it is still conceded that those are acts sufficient to maintain the action. Clark v. Machette, 92 Colo 365, 21 P2d 182 (1933); Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 26 A.2d 559 (1942); Aluminum Siding Corp. v. Dun & Bradstreet, Inc., 163 F. Supp. 906 (S.D.N.Y. 1958); Ledwith v. International Paper Co., 64 N.Y.S 2d 810 (1946), affd. 271 App. Div. 864, 66 N.Y.S. 2d 623. Contrary to the Appeals Court, many cases hold that the overt act can be lawful and innocent if the purpose is to wrongfully interfere with business as alleged herein, and action maintained.

Am. Tobacco Co. v. U.S., 328 U.S. 781, 90 L.Ed. 1575, 66 S.Ct. 1125; Fort v. Coop. Farmers Exch., 256 P. 319 (Colo. 1927); (Colo. 1927); Martin v. Am. Home Prod. Corp., 94 F.Supp. 57 (S.D.N.Y., 1950); Ledwith v. Internat'l Paper Co., supra.

Allegations must be accepted as true when considering sufficiency of a complaint. Colo. Nat'l Bank v. F.E. Biebert Co., 165 Colo. 78, 438 P.2d 506. The Court of Appeals wrongfully determined that the Risk Management Committee was acting within jurisdiction of C.R.S. 12-43.5-101 and in good faith. (A-11). On their face, none of its requests to examine records was related to quality of medical care. Their only claimed interest was in record-keeping. There is no competent evidence that the committee qualified under C.R.S. 12-43.5-

102. It claimed existence for years before that statute was enacted in 1975. (see p. A-80) The name of the committee as named by the Appeals Court on page A-5, paragraph 1, is a figment of imagination. What amounts to coercion, intimidation, or threats of injury to conduct of a business is a matter of fact and depends upon each particular case. Lohse Patent Door Co. v. Fuelle, supra. The character and effect of a conspiracy are not to be judged by dismembering its parts, as the Appeals Court did here, but the whole picture is to be considered by a jury. Am. Tobacco Co. v. U.S., 147 F.2d 93 (6th Circ, 1944).

In the 4th claim under 42 U.S.C. § 1983, the petitioner claims he was deprived of Constitutionally protected rights including right to be free from threats, intimidation, oppression, and other interference in his

practice of medicine done here under color of state law. Adler v. Montefiore Hosp. Assoc. of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634; U.S. v. Classic, 313 U.S. 299, 85 L.Ed. 1368; Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473. The Appeals Court erroneously ruled that for purposes of 42 U.S.C. § 1983 that there is no state action "unless a state statute compels a private party to act in a certain way." (A-14) That is in conflict with the intent of the statute and with decisions of this Court. U.S. v. Classic, supra. The defendants flashed as their badges of authority Colorado statutes designated in their letters.

The outrageous conduct claim was not dismissed for failure to state a claim for which relief can be granted. It was later dismissed by summary judgment and by

avoiding the allegations in paragraphs 22-41 of the complaint incorporated in the claim for outrageous conduct. Further, the necessity of profane, insulting language is a new and untenable requirement. Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753; Meiter v. Cavanaugh, 40 Colo. App. 454, 580 P.2d 399. The totality of conduct of defendants and in relationship to their positions of trust and power to affect the interest of the petitioner was erroneously ignored. See RESTATEMENT 2d, TORTS § 46, comment (e)(1965). Malicous threatening conduct as herein by an insurance company with one it insures even under color of exercising its rights may subject it to action for outrageous conduct. Fletcher v. Western Nat'l Life Ins. Co., 10 CA3 376, 89 CR 78. Further, stay of discovery deprived the plaintiff of facts

solely within knowledge of defendants to develop his case. See Slagle v. U.S., 228 F.2d 673 (5th Circ, 1956); Udemstock v. Am. Mortg. & Invest. Co., 495 F.2d 589 (10th Circ, 1974); Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99.

Discovery

The Appeals Court erroneously considered motions to dismiss for lack of prosecution which were not heard or ruled upon by the trial court. 27 C.J.S. p. 460. This case was commenced April 28, 1977. On July 19, 1977, the plaintiff-petitioner requested defendants Brittain, Fry, and Hartford to produce documents and things included in 10 paragraphs. They included all documents in their possession related to the petitioner. They specifically listed reports of surveillances of the petitioner and all

documents Fry and Hartford published to Brittain. That discovery was refused and the petitioner filed a motion to compel that discovery on October 3, 1977. That was within 6 months of the commencement. It was erroneously denied. The order is printed in Appendix A, pages A-148 through A-151.

None of the materials requested were prepared for this trial, and none were prepared for these defendants. They were prepared for Marks and Larsen. They did not come under the exception to discovery of C.R.C.P. Rule 26(b)(3), supra. The documents disclosed to Brittain are at the heart of this lawsuit. They were ar are essential, and are solely within the knowledge of the defendants. There can be no substitute. Disclosure to Brittain, an outsider, by Fry and Brittain waived their secret

nature which extended to the whole transaction. Fearnley v. Fearnley, 44 Colo. 417, 98 P. 819; 97 C.J.S. pp. 865, 869; U.S. v. Kelsey-Hayes Wheel Co. 15 F.R.D. 461 (E.D. Mich S.D. 1954); Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448 (D.C., S.D. N.Y., 1955); D'Ippolito v. Cities Service Co., 39 F.R.D. 610 (S.D.N.Y., 1965); Philadelphia Electric Co. v. Anaconda American Brass Co., 275 F.Supp. 146 (D.C. E.D. Pa, 1967); B & C Trucking Co. v. Holmes & Narver, Inc., 39 F.R.D. 317 (D.C. Haw. 1966); Doughtery v. Gellenthin, 99 N.J. Super. 283, 239 A.2d 280 (1968).

After such denial of essential discovery, the plaintiff- petitioner proceeded to vigorously prosecute the Marks-Larsen case which was interrupted by the defendants herein. It was practical and logical that that case

be tried before the instant case. See 27 C.J.S. pp. 443, 445, 450. That trial ended March 6, 1980, which was followed by the petitioner seeking writ of mandamus concerning a verdict found after the jury was discharged which the court accepted, and based upon it ordered a mistrial. As soon as practical, the petitioner proceeded in discovery. In March, 1980, the petitioner submitted interrogatories to Fry which he refused to answer. He refused to appear for deposition in June, 1980. Requests for admission submitted in July, 1980 were all unanswered. Subpoena was served upon another witness. Then on December 3, 1980, the defendants appeared before the Court in an ex parte hearing to seek protective orders. It was without notice and there was no showing why the hearing was

necessary, much less ex parte. They had already submitted objections to the discovery. The Court ordered stay of all discovery, which order the petitioner did not receive until after hearing concerning motions for summary judgment on December 12, 1980. Summary judgment for defendants was ordered. (Appendix A, pages A-133 through A-147)

Even without the denied discovery, and even without depositions of defendants and co-conspirators taken in related cases incorporated herein by petitioner's affidavit, it is submitted that affidavits and unanswered requests for admission were sufficient to overcome motions by defendants for summary judgment. The aforementioned depositions were wrongfully excluded from the record by the trial Court and Appeals Court. The clerk of the trial Court, in

apparent anticipation of the exclusion later requested and ordered later had not transmitted another designated portion of the record which included parts of those depositions. The trial Court had nothing but some insufficient self-serving affidavits of the defendants and their confederates upon which to base its facts found. The refuting and conflicting sworn testimony taken in a related case concerning the issues of this case were excluded and the petitioner was not allowed to cross-examine the affiants in conflict with Parrish v. De Remer, supra, and with Conley v. Gibson, supra. Counsel for defendants herein represented Fry during his deposition in the related case, and represented the members of the Risk Management Committee except for Brittain. For his deposition in the Marks case,

Brittain was represented by other counsel employed by Hartford. Brittain admitted the publications alleged and had interpreted the letter, Exhibit A of the complaint, as a "scathing indictment of Dr. Tyler's behavior in an emergency room situation." He admitted doing nothing to determine if the content of the letter was true or not prior to his republishing it. Fry admitted that medical records were in the files without consent of patients. Those medical records are presumed to be the same as ones blatently produced at the Marks trial which failed to discredit the petitioner, but revealed that in their attempted entrapment that lives of patients were deliberately placed in jeopardy to antagonize the petitioner. Brittain and other members of the committee admitted in their depositions that their only interest

in medical records they requested to examine was for hypothetical legal purposes. Except for being sued for malpractice, none of the committee members had expertise in law. They all admitted that they had not determined that the petitioner was an increased insurance risk. They made their recommendation that his insurance not be renewed because he did not grant them permission to examine all of the hospital medical records of all patients cared for therein by him. A copy of their recommendations was never sent the petitioner and was denied him in discovery in conflict with the mandatory requirement of C.R.S. 12-43.5-102 (3)(b)(II)(c) supra. It is submitted that that recommendation is libelous and subject to the 3rd, 4th, and 5th claims for relief.

Federal Issues Presented

Federal issue of claim under 42 U.S.C. § 1983 was presented in the complaint. In memorandum on June 26, 1980, in response to defendants' motion for summary judgment, the petitioner designated a "Notice of Constitutional issues." It included claims: (1) that defamation concerning his profession by the defendants deprived him of property and liberty protected by the 14th Amendment of the U.S. Constitution; (2) dismissal of the 3rd and 4th claims deprived him of the property right of trial for damages protected by the 14th Amendment; (3) that without due process of law in violation of the 14th Amendment the defendants deprived the petitioner of the valuable right and liberty to practice medicine without unlawful interference; (4) that denial of discovery of documents published

to Brittain by Fry and Hartford deprived the petitioner the right to a fair trial protected by the 14th Amendment; and (5) that the 14th Amendment guaranteed the petitioner equal protection of the law and due process of law requiring that the decision of the Gaylor case not be cited as precedent in the instant case.

The foregoing claims of federal issues were not addressed by the Colorado Courts. On appeal subject of this petition, the petitioner referred to the record of the foregoing notice of Constitutional issues. Added to those was the claim of denial of right to trial of the issues of this case and by jury without due process of law. It was submitted that the petitioner's rights guaranteed by the 5th, 9th, and 14th Amendments of the U.S. Constitution were violated. In his petition to the Colorado Supreme Court for writ of certiorari, it was

submitted that he had been deprived of rights protected by the 1st, 9th, and 14th Amendments of the U.S. Constitution without due process of law. The Colorado Courts only ruled on the issues of the 4th claim for relief based upon 42 U.S.C. § 1983 and dismissed it by finding no state action and no Constitutionally protected rights involved.

The defendants herein joined a conspiracy in progress which involved the petitioner's right to practice medicine in Brighton Community Hospital, and its deprivation without due process of law. The complaint in that action, published by Fry and Hartford to Brittain contained such a claim based upon 42 U.S.C § 1983. The hospital was a public community hospital, leased by the city and subleased to the Brighton Community Hospital Association. In attempt to preserve rights protected by the 14th Amendment, the By Laws

of the Medical Staff, Art. III, 2 provided:

> All rights under the constitutions of the United States, Colorado and the laws of the State of Colorado and the United States apply and are available to the members of the staff of this hospital and specifically in reference to their practice in this hospital and membership in the Medical Staff.

Those by laws were incorporated in the complaint in the instant case along with the municipal ordinances providing for the lease and operation of the Brighton Community Hospital.

REASONS FOR GRANTING THE WRIT

The right to trial for damages from intentional torts as herein was established in the common law as an essential right long before the founding of this republic. BLACKSTONE: Commentaries on the Laws of England, Vol. I, pp. 141, 144. The Colorado Courts have clearly deprived the petitioner of his common law, Constitutionally

protected, property right of trial for damages without due process of law. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., supra. Unless this Court grants this writ, courts of the State of Colorado are closed to this petitioner and to anyone else in the choosing of their judges.

Collateral estoppel was applied without adherence to procedural and substantive due process of law. Its application was not in accord with at least one decision by this Court. County of Mobile v. Kimball, supra. It was not in accord with decisions of federal courts. William Whitman Co. v. Universal Oil Products Co., supra; Missouri Utilities Co. v. City of California, supra.

The right and liberty of security in one's reputation is well established in the common

law. BLACKSTONE, supra pp. 133-134. The petitioner has been deprived without due process of law his property right to trial for damages for defamation and for its effect upon his property right of practice of medicine. This has been done under color of a decision of this Court, but not in accord with that decision, Gertz v. Welch, supra. There is a need for this Court to clarify its dictum in that case which appears to allow defamation of private persons if it is an expression of opinion. See 76 Col. L. Rev. 1205 (1976). The Colorado Courts have shown as herein that any defamation can be labeled "an opinion." The allowing without being liable for damages from defamation by such means violates the common law, the 7th Amendment, and the Fourteenth Amendment.

The character of physicians in organization-inspired bravado to vilify their colleagues,

competitors, and particularly innovators is well documented and has not changed in the period of recorded history. It even included the vilification of Jesus Christ. Matthew, 12:8-24. At no time before in history has organized medicine had the total unfettered power it has at this time, backed by the State and Federal governments, demonstrated in this case, to prevent well qualified physicians from practicing their chosen profession. This power has been directed particularly against those who have the ability and desire to improve medical care by change.

The petitioner has been deprived his right to practice medicine in a public community hospital without due process of law. Whether or not this right is protected by the 14th Amendment is of vital importance

to the security of physicians and their patients in this nation. Hospitals are of public interest and Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 is applicable. Reitman v. Mulkey, 387 U.S. 369, 18 L.Ed. 822, 87 S.Ct. 1627. Other states' courts and federal courts in circuits other than the Tenth have ruled that the practice of medicine in public and other hospitals is protected by the 14th Amendment. Holmes v. Silver Cross Hospital of Joliet, Illinois, 340 F.Supp. 125 (N.D.Ill.E.D.1972); Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (1974); Sams v. Ohio Valley General Hosp. Assoc., 413 F.2d 826 (4th Circ 1969); Citta v. Delaware Valley Hosp., 313 F.Supp. 301 (E.D.Pa.1970); Eaton v. Grubbs, 329 F.2d 710 (4th Circ, 1963);

Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Circ., 1963), cert den. 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659; Suckle v. Madison Gen. Hosp., 362 F.Supp. 1196 (W.D. Wisc, 1973).

The defendants herein joined the conspiracy in progress which deprived the petitioner without due process of law of his right to practice medicine in a public hospital and are thereby responsible. Shirley v. State Nat'l Bank of Connecticut, 493 F.2d 739 (2nd Circ, 1974); U.S. v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267.

The Colorado Courts' decision that the petitioner did not have a Constitutionally protected right to be free of harassment, oppression, and intimidation in his practice of medicine by the defendants herein acting under color of state statutes

in a committee of the state medical society is not in accord with decisions of this Court. Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796; See Adler v. Montefiore Hosp. Assoc. of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634. The amount of damage inflicted is a matter of fact for the jury.

The Colorado Courts' decision that there was no state action here under 42 U.S.C. § 1983 because the State statutes involved did not compel the defendants to act in their unlawful ways is not in accord with decisions of this Court. U.S. v. Classic, supra; Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473. There is an apparent wide disparity in rights

guaranteed by the U.S. Constitution and their support and enforcement. It is submitted that the petitioner presents a need for the protection for which the Amendments of the Constitution were designed to provide in a matter that is of great importance to all physicians in this natiton and to the public whom they serve.

The dismissal of the 3rd claim for damages due to unlawful interference with practice of medicine and by conspiracy was not in accord with decisions of this Court and with decisions of other federal courts. Duplex Printing Press Co. v. Deering, supra; Pettibone v. U.S., supra; Alaska SS. Co. v. Internat'l Longshoremen's Assoc., supra; Dextone v. Building Trades Council, supra;

Am. Tobacco Co. v. U.S. supra.

Denial of discovery was not in accord with decisions of this Court and with decisions of other federal courts. Conley v. Gibson, supra; Udemstock v. Am. Mortg. & Invest. Co., supra; Slagle v. U.S., supra; U.S. v. Kelsey, supra; Connecticut Mutual Life Ins. Co. v. Shields, supra; D'Ippolito v. Cities Service Co., supra; Philadelphia Electric Co. v. Anaconda American Brass Co., supra; B & C Trucking Co. v. Holmes & Narver, Inc., supra; Doughtery v. Gellethin, supra.

The petitioner submits that he has a right to trial for damages as to each and all of his 5 claims for relief. Petitioner submits that he has a right to discovery which has been denied him.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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